Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

No. 08-235

In the Supreme Court of the United States

SHAFIQ RASUL, ET AL., PETITIONERS

v.

RICHARD MYERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, does not provide relief to aliens captured during a time of armed conflict and held outside the United States at Guantanamo Bay, Cuba.

2. Whether the court of appeals correctly held that respondents are entitled to qualified immunity on petitioners' constitutional claims.

3. Whether the court of appeals correctly held that the United States should be substituted for the individual defendants pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(b)(1).

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-66a) is reported at 512 F.3d 644. The opinions of the district court (Pet. App. 71a-99a, 102a-145a) are reported at 433 F. Supp. 2d 58 and 414 F. Supp. 2d 26, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on January 11, 2008. A petition for rehearing was denied on March 26, 2008 (Pet. App. 146a-147a). On June 2, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 22, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the wake of the terrorist attacks of September 11, 2001, the President took immediate action to prevent additional attacks, and Congress swiftly approved his use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001). The President ordered United States Armed Forces to subdue both the al Qaeda terrorist network and the Taliban regime that harbored it in Afghanistan. Although United States and allied troops have removed the Taliban from power and dealt al Qaeda forces a heavy blow, armed combat continues.

During that conflict, the United States, consistent with the law and settled practice of armed conflict, has seized many hostile persons and detained a small proportion of them as enemy combatants. A number of those individuals have been or are being held at the United States Naval Base at Guantanamo Bay, Cuba (Guantanamo).

b. Petitioners are four British citizens who were captured in Afghanistan in the months following September 11. Pet. App. 104a-105a, 165a-166a. According to the allegations in their complaint, which are not conceded but must be taken as true at this stage of the litigation, three of the petitioners were captured by a warlord in Afghanistan in November 2001 and turned over to the United States. *Id.* at 165a. The fourth petitioner alleges he was captured by the Taliban, released, and then detained by United States forces. *Id.* at 165a-166a. All four petitioners were transferred to Guantanamo in

early 2002 and released in March 2004. *Id.* at 167a, 207a.

2. After petitioners were released from United States custody and sent to the United Kingdom, they brought this civil action against then-Secretary of Defense Donald H. Rumsfeld and ten other senior Department of Defense officials in their individual capacities. Petitioners alleged that they suffered inhumane treatment, some of which they allege constituted torture, at the hands of unidentified United States military personnel. Pet. App. 167a, 189a-207a. They also alleged that United States military officials infringed on the practice of their religion, at times interfering with their prayers and withholding or desecrating copies of the Koran. *Id.* at 223a. Petitioners alleged that their mistreatment "was not simply the product of isolated or rogue actions by individual military personnel," because it stemmed from "deliberate and foreseeable" action taken to "coerce nonexistent information regarding terrorism." *Id.* at 168a-169a. They alleged that "[t]he torture, threats, physical and psychological abuse inflicted upon [petitioners] were devised, approved, and implemented by Defendant Rumsfeld and other [respondents] in the military chain of command. These techniques were intended as interrogation techniques to be used on detainees." *Id.* at 208a. Petitioners further alleged that respondents knew that petitioners were tortured or mistreated, "took no steps to prevent the infliction of torture and other mistreatment," and "authorized and encouraged the infliction of torture and other mistreatment against [petitioners]." *Id.* at 212a-213a.

Petitioners' complaint sought relief under the Alien Tort Statute (ATS), 28 U.S.C. 1350, for alleged violations of international law (Counts 1-3). Pet. App. 214a-

218a. Petitioners also claimed that respondents had violated unspecified provisions of the Third and Fourth Geneva Conventions (Count 4), *id.* at 218a-219a, the Fifth and Eighth Amendments to the United States Constitution (Counts 5 and 6), *id.* at 219a-222a, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* (Count 7), Pet. App. 222a-224a.

Pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(b)(1), the Attorney General (through his designee) certified that, "at the time of the conduct alleged in the complaint," the individual respondents "were acting within the scope of their employment as employees of the United States," and substituted the United States for the individual respondents on the claims for violation of the ATS and the Geneva Conventions. C.A. App. 60; see 28 U.S.C. 2679(b)(1) (making a suit against the United States the exclusive remedy for seeking money damages for the wrongful act or omission of a Government employee acting in the scope of employment). Respondents moved to dismiss those counts because petitioners had not exhausted their administrative remedies. Respondents also moved to dismiss the constitutional and RFRA claims on the basis of qualified immunity.

3. a. In its initial decision, the district court deferred consideration of the RFRA claim but granted respondents' motion to dismiss the other claims. Pet. App. 100a-146a. On the international law claims (under the ATS and the Geneva Conventions), the court held that the United States had been properly substituted for the individual defendants. *Id.* at 110a-111a. Applying the *respondeat superior* law of the District of Columbia, the court held that respondents were acting within the scope

of their employment when the alleged acts occurred. The court determined that the United States had "authorized military personnel in Guantanamo to exercise control over the detainees and question the detainees while in the custody of the United States," and that "the complaint points to actions which arose specifically from authorized activities." *Id.* at 119a. After substituting the United States, the court dismissed the claims because petitioners had not exhausted their administrative remedies under the Federal Tort Claims Act (FTCA), ch. 753, Tit. IV, 60 Stat. 842. Pet. App. 130a-131a.

b. On the constitutional claims, the district court held that respondents are entitled to qualified immunity. Pet. App. 131a-143a. The court declined to determine whether petitioners had alleged constitutional violations, holding that respondents are entitled to qualified immunity because any constitutional rights with respect to Guantanamo detainees were not clearly established at the time of the conduct. *Id.* at 134a-143a.

c. After supplemental briefing, the district court addressed petitioners' RFRA claim and denied respondents' motion to dismiss. Pet. App. 70a-99a. Noting that the statute extends by its terms to "each territory and possession of the United States," 42 U.S.C. 2000bb-2(2), the court held that Guantanamo is a "possession" of the United States within the meaning of the statute. Pet. App. 81a-83a. The court then held that RFRA applies to non-resident aliens like petitioners because aliens detained at Guantanamo are "persons" for purposes of RFRA. *Id.* at 88a-89a. It also held that respondents are not entitled to qualified immunity on the RFRA claim because the rights of Guantanamo detainees under RFRA were clearly established at the time of petitioners' detention. *Id.* at 94a-99a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-66a.

a. The court of appeals first held that petitioners' claims against the individual respondents under the ATS were properly dismissed pursuant to the Westfall Act. Applying D.C. law concerning the scope of employment, the court concluded that, taking the allegations in the complaint as true, respondents had acted within the scope of their employment. Pet. App. 21a-32a. In particular, it concluded that "the underlying conduct—here, the detention and interrogation of suspected enemy combatants—is the type of conduct [respondents] were employed to engage in." *Id.* at 25a-26a. The court noted that, while petitioners "challenge[d] the methods [respondents] used to perform their duties," they did "not allege that [respondents] acted as rogue officials or employees who implemented a policy of torture for reasons unrelated to the gathering of intelligence." *Id.* at 26a.

Because respondents' alleged conduct fell within the scope of employment for purposes of the Westfall Act, the court of appeals held that the ATS claims were properly restyled as claims against the United States under the FTCA. Pet. App. 30a. The court then held that the district court correctly dismissed the FTCA claims because petitioners had not exhausted their administrative remedies. *Id.* at 31a-32a.[1]

For the same reason, the court of appeals affirmed the dismissal of petitioners' claim under the Geneva Conventions. It held that the alleged conduct falls within the scope of employment, and a suit against respon-

[1] Noting that the legal issue could be decided on the basis of petitioners' allegations, the court of appeals also held that the district court did not abuse its discretion in denying petitioners' request for discovery on the scope of employment. Pet. App. 33a-34a.

dents is precluded by the Westfall Act. Pet. App. 34a-35a.

b. The court of appeals affirmed the dismissal of petitioners' *Bivens* claims asserting violations of their Fifth and Eighth Amendment rights. Pet. App. 36a-44a. The court observed that it had recently held in *Boumediene* v. *Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2229 (2008), that detainees at Guantanamo lack constitutional rights because they are aliens without property or presence in the United States. Pet. App. 36a-37a.

The court of appeals also held that "[e]ven assuming *arguendo* the detainees can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to [respondents'] assertion of qualified immunity." Pet. App. 41a. The court observed that, even before its decision in *Boumediene*, "courts did not bestow constitutional rights on aliens located outside sovereign United States territory." *Id.* at 42a. The court also held that, "[b]ased on the plain text of the lease [between the United States and Cuba] and on case law, it was not clearly established at the time of the alleged violations * * * that a reasonable officer would know that Guantanamo is sovereign United States territory." *Id.* at 44a.

c. The court of appeals held that the district court erred in denying respondents' motion to dismiss the RFRA claim. Pet. App. 45a-54a. Finding it unnecessary to address whether RFRA generally applies extraterritorially, the court determined that petitioners are not "persons" covered by the statute. *Id.* at 45a-46a.

The court of appeals noted that, while RFRA's text does not define "person," under various constitutional provisions the term does not include non-resident aliens. Pet. App. 47a. Because RFRA's purpose was "to restore

what, in the Congress's view, is the free exercise of religion guaranteed by the Constitution," the court determined that "'person' as used in RFRA should be interpreted as it is in constitutional provisions." *Id.* at 52a. The court noted that this Court had previously held that German nationals held in Germany were not "persons" under the Fifth Amendment, *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950), and that the term "people" as used in the Fourth Amendment does not include non-resident aliens, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Pet. App. 53a. Thus, the court concluded that "RFRA's use of 'person' should be interpreted consistently with the Supreme Court's interpretation of 'person' in the Fifth Amendment and 'people' in the Fourth Amendment to exclude non-resident aliens. Because the plaintiffs are aliens and were located outside sovereign United States territory at the time their alleged RFRA claim arose, they do not fall with[in] the definition of 'person.'" *Id.* at 54a (footnote omitted).[2]

d. Judge Brown concurred. Pet. App. 55a-66a. She agreed that the ATS and Geneva Convention claims must be dismissed. *Id.* at 55a. She also agreed that the *Bivens* claims for constitutional violations were properly dismissed, but she reached that conclusion without addressing the applicability of the Fifth and Eighth Amendments to Guantanamo detainees. Judge Brown would have held that special factors counsel hesitation in the creation of a *Bivens* remedy in this context, relying on circuit precedent refusing to allow a *Bivens* ac-

[2] The court declined to determine whether qualified immunity is available for claims brought under RFRA, but noted that "[b]oth the Supreme Court and our court have recognized qualified immunity is available to counter not only constitutional claims but also certain statutory claims." Pet. App. 46a n.20.

tion "for Nicaraguans who brought claims against U.S. government officials for supporting the Contras" because it would have significant national security and foreign policy implications. *Id.* at 55a-58a (discussing *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985)).

Judge Brown also concurred in the majority's holding that the RFRA claim must be dismissed, but for different reasons. She disagreed with the panel's holding that the term "person," as used in RFRA, did not apply to nonresident aliens. Pet. App. 59a-63a. Yet, she concluded that other factors left no doubt that Congress did not intend for RFRA to apply to petitioners. *Id.* at 63a. Even if that were not true, she "would have no trouble concluding [respondents] are protected by qualified immunity," because RFRA's application to aliens like petitioners was not clearly established. *Id.* at 63a-65a. Judge Brown concluded that "[a]ccepting [petitioners'] argument that RFRA imports the entire Free Exercise Clause edifice into the military detention context would revolutionize the treatment of captured combatants in a way Congress did not contemplate." *Id.* at 65a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with decisions of this Court or any other court of appeals. The court of appeals reasonably concluded that military detainees could not impose personal monetary liability on the Nation's military commanders for overseas conditions of confinement during a time of war. At the very least, any such right was not clearly established at the time of petitioners' detention in Guantanamo. Nor is this case the proper vehicle for addressing the application of RFRA to aliens outside the United States

or whether the Fifth and Eighth Amendments apply to Guantanamo detainees. Because respondents here will in any event be entitled to qualified immunity with respect to the RFRA and constitutional claims, the petition for a writ of certiorari should be denied.

1. The court of appeals' holding that petitioners' RFRA claim was correctly dismissed (Pet. App. 45a-54a) does not warrant this Court's review.

a. The court of appeals correctly held that RFRA does not apply to aliens detained at Guantanamo. RFRA provides that the "Government shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). RFRA also gives a statutory right of action to a "person whose religious exercise has been burdened." 42 U.S.C. 2000bb-1(c).

The statute does not define the term "person." Nor does it specify that the term includes aliens outside the sovereign territory of the United States. Petitioners insist that the term should be read expansively to cover any individual anywhere under any circumstances—an interpretation that would apply not just to Guantanamo detainees, but to any detainee held in any detention facility during any war. As Judge Brown recognized in her concurring opinion, such a holding "would revolutionize the treatment of captured combatants in a way Congress did not contemplate." Pet. App. 65a. It would allow wartime detainees to sue and recover money from their captors during an ongoing war.

The court of appeals correctly concluded, on the basis of statutory context, that Congress did not intend for

RFRA to apply to such aliens. Pet. App. 48a-49a. As its title indicates, the Religious Freedom Restoration Act was intended to *restore* free exercise rights for those who previously had them—not to create new rights that had never previously been recognized. RFRA was enacted in response to this Court's decision in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), which held that a generally applicable law may burden a religious exercise even when the government does not demonstrate a compelling interest for its rule. *Id.* at 884-889. As the statutory text plainly says, Congress's express purpose in RFRA was to "*restore* the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972)." 42 U.S.C. 2000bb(b)(1) (emphasis added).[3]

The legislative history is equally clear in expressing Congress's expectation that courts would look to pre-*Smith* cases to apply RFRA. See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993); S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993); see also *id.* at 9 ("the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*"); *id.* at 2 (the Act "responds to the Supreme Court's decision in * * * *Smith* by creating a statutory prohibition against government action substantially burdening the exercise of religion") (footnote omitted). As the Senate Report stated, "the purpose of this act is *only* to over-

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[3] A second purpose articulated in the statute, to "provide a claim or defense to *persons* whose religious exercise is substantially burdened by government," 42 U.S.C. 2000bb(b)(2), merely begs the question presented here: whether aliens abroad are "persons" whose religious exercise may not be burdened except by meeting the compelling-interest standard.

turn the Supreme Court's decision in *Smith*." *Id.* at 12 (emphasis added).

In light of the expressly stated purpose of Congress simply to restore the compelling-interest test for pre-existing free exercise claims, the court of appeals correctly held that the "person[s]" protected by RFRA are those who had recognized constitutional rights at the time RFRA was enacted. Pet. App. 48a-49a. Petitioners do not dispute that when Congress enacted RFRA, it had long been established that aliens outside United States territorial jurisdiction who lacked a substantial connection to the United States were not entitled to First Amendment protections. See *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (*Turner*); see also *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). Indeed, applying those principles in 1995, the Eleventh Circuit specifically held that aliens *at Guantanamo* could not assert First Amendment rights. *Cuban Am. Bar Ass'n* v. *Christopher*, 43 F.3d 1412, 1429-1430, cert. denied, 515 U.S. 1142, and 516 U.S. 913 (1995).

The courts had also made clear that the "people" protected by the Fourth Amendment are "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265; see *Turner*, 194 U.S. at 292 (an excludable alien is not entitled to First Amendment rights because the alien "does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). Courts had also uniformly held that aliens "outside the sovereign territory of the United States" are not "person[s]" under the Fifth Amendment. See *Verdugo-Urquidez*, 494 U.S. at

269; *Jifry* v. *FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005); *Peoples Mojahedin Org.* v. *United States*, 182 F.3d 17, 22 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000).[4]

Because RFRA merely "restore[d] the compelling interest test as set forth in Sherbert," 42 U.S.C. 2000bb(b)(1), and because that test afforded no protection to aliens abroad who lacked a substantial connection to the United States, it follows that Congress did not intend that the definition of "person" in RFRA extend to those aliens. Petitioners' argument to the contrary would create a result demonstrably at odds with the context of the statute and the express intent of Congress.

b. Petitioners contend (Pet. 19-20) that RFRA does not simply duplicate pre-existing constitutional protections, but instead extends First Amendment-like protections "to religious practices" that had previously been held unprotected under the First Amendment. In support of that contention, petitioners note that RFRA applies to prison inmates and military personnel, overruling cases such as *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

But nothing in RFRA purported to extend its reach to *persons* who were not previously covered by the First

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[4] While the Court in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), held that the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, applied to aliens on a United States military base in Bermuda (and likened that base to Guantanamo), it also made it clear that analysis of the geographic application of a statute "depends upon the purpose of the statute." *Id.* at 378, 390. In light of RFRA's purpose to restore the pre-*Smith* standard for free exercise claims, *Vermilya-Brown*'s discussion of the status of Guantanamo does not establish that RFRA applies to aliens detained there.

Amendment. Residents of the United States seeking to use narcotics for religious purposes (as in *Smith*), military personnel seeking to wear yarmulkes (as in *Goldman*), and prison inmates seeking to attend religious services (as in *O'Lone*) had always had First Amendment rights. RFRA merely ensured that their free exercise claims would be adjudicated under the pre-*Smith* compelling-interest standard. Nowhere does the statute suggest that Congress intended to give rights to persons who never had First Amendment rights in the first instance.[5]

c. Petitioners mischaracterize the court of appeals' decision as holding that "because Guantánamo detainees have no constitutional rights (a blanket proposition rejected by this Court in *Boumediene*), they also have no rights under RFRA." Pet. 17-18 (citation omitted). That is not what the court of appeals held. Instead, it held that Congress intended to incorporate the pre-*Smith* standard governing free exercise claims, and intended RFRA's application to "person[s]" to include individuals who had recognized free exercise rights. Pet. App. 48a-49a.

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[5] Citing a brief from 1997, petitioners claim (Pet. 20-21) that the United States has previously argued that "RFRA expressly supplements and extends protection to religious practices that may not be covered by the Constitution." In fact, the passage they cite from the earlier brief simply noted (and cited cases supporting the proposition) that RFRA created a "statutory right" rather than "new constitutional rights." U.S. Br. at 36-37 & n.40, *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (No. 95-2074). Of course RFRA protects "religious practices that may not be covered by the Constitution" (Pet. 20) as interpreted since *Smith*. But that does not mean that Congress intended the new statutory right to extend to practices that had *never* been seen to be protected by the First Amendment under the compelling-interest test.

As petitioners acknowledge (Pet. 22), the application of RFRA is a statutory question about congressional intent, and not simply a determination of the current state of the Constitution's application to aliens at Guantanamo. Thus, the reach of this Court's decision in *Boumediene* is not controlling, because it does not resolve the question of congressional intent as to RFRA. Even if *Boumediene*'s Suspension Clause holding were extended to the First Amendment, that would not change the fact that Congress enacted RFRA with the intent to limit its statutory entitlement to persons who had First Amendment rights before *Smith*.[6]

d. In any event, this case is not a suitable vehicle for addressing whether RFRA applies to alien detainees held at Guantanamo because respondents will be entitled to qualified immunity either way. See Pet. App. 64a (Brown, J., concurring). Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).[7] The doctrine of qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but

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[6] The applicability of *Boumediene* to other constitutional provisions is at issue in several cases pending in the lower courts. See, *e.g.*, *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C.) (Due Process); *Hamdan* v. *Gates*, No. 04-CV-1519-JR (D.D.C.) (Due Process, Ex post Facto, Bill of Attainder, Equal Protection); see also *Khan* v. *Gates*, No. 07-1324 (D.C. Cir.) (First Amendment).

[7] Petitioners do not dispute Judge Brown's observation (Pet. App. 64a n.5) that they "assumed that qualified immunity is available [on the RFRA claim] and * * * thus waived any argument to the contrary" (except by showing that the right they assert was clearly established).

the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)).

To defeat qualified immunity, the right invoked must be "clearly established" at the time the officer acted, such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987). It is not enough for a plaintiff to identify some generalized right that was established at the time of the relevant conduct. *Saucier*, 533 U.S. at 201-202. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. While the *precise* conduct at issue need not have been previously held to be unlawful, its "unlawfulness must be apparent" in "light of pre-existing law." *Ibid.*; see *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).

At the time petitioners were detained (between 2002 and March 2004), a reasonable official could have doubted, at a minimum, that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war. As explained above, a reasonable official could have concluded from RFRA's text and legislative history that the statute was designed merely to restore the legal standard governing pre-existing free exercise rights. See, *e.g.*, S. Rep. No. 111, *supra*, at 12 ("[T]he purpose of this act is *only* to overturn the Supreme Court's decision in *Smith*.") (emphasis added); see also *Florida Pre-*

paid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627, 638 (1999) ("Through RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith*."). Moreover, a reasonable official would have been justified in relying on prior case law establishing that aliens outside the United States in general—and aliens *at Guantanamo* in particular—did not enjoy First Amendment rights. See, *e.g.*, *Verdugo-Urquidez*, 494 U.S. at 265; *Cuban Am. Bar Ass'n*, 43 F.3d at 1429-1430.[8]

2. The court of appeals' holding that petitioners' *Bivens* claims for alleged violations of the Fifth and Eighth Amendments were correctly dismissed (Pet. App. 36a-44a) does not warrant this Court's review.

a. Petitioners argue (Pet. 25-26) that the court of appeals' holding is inconsistent with this Court's subsequent decision in *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008). But *Boumediene* did not hold that all provisions of the Constitution protect Guantanamo detainees. The

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[8] Certiorari is particularly unwarranted in light of the strength of respondents' argument that the right was not clearly established at the time they acted (an argument the court of appeals did not reach, see Pet. App. 47a n.20). Regardless of whether this Court overturns the requirement that lower courts conducting qualified-immunity analysis must decide whether a legal right exists before deciding whether that right was clearly established at the relevant time, see *Pearson* v. *Callahan*, 128 S. Ct. 1702, 1702-1703 (2008) (No. 07-751; argued Oct. 14, 2008), this Court has not felt itself bound to follow that framework, see *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), and the fact that this alternative ground for rejecting petitioners' claims exists provides an independent basis for denying certiorari. Cf. *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("[T]his is a court of final review and not first view.") (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 399 (1996) (Ginsburg, J., concurring in part and dissenting in part)).

Court held only that Guantanamo detainees have a procedural right under the Suspension Clause to file a habeas petition and thus receive judicial review of "both the cause for detention and the Executive's power to detain." *Id.* at 2269. Moreover, *Boumediene* expressly noted that it did not address any "claims of unlawful conditions of treatment or confinement." *Id.* at 2274.[9] Indeed, the Court explained that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention" (let alone their conditions of confinement). *Id.* at 2277. Rather, "[t]hat is a matter yet to be determined," because the Court "h[e]ld" only "that petitioners may invoke the fundamental procedural protections of habeas corpus." *Ibid.*

Thus, *Boumediene* did not overturn the Court's prior rulings that the individual-rights provisions of the Constitution run only to aliens who have a substantial connection to our country and not to enemy combatants who are detained abroad. In *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), for instance, this Court had addressed whether aliens outside the sovereign territory of the United States possess "substantive constitutional rights" in general, *id.* at 781, and Fifth Amendment rights in particular, *id.* at 781-785, and it held that they

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[9] Petitioners' contention (Pet. 26) that *Boumediene* held that "the substantive guarantees of the Fifth and Fourteenth Amendments" apply to Guantanamo detainees is not supported by the passage they cite. In that passage, the Court merely acknowledged that separation-of-powers doctrine, "like the substantive guarantees of the Fifth and Fourteenth Amendments," protects "persons as well as citizens." 128 S. Ct. at 2246. It cited *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886), a case that involved aliens living in the United States. Accordingly, that passing statement cannot be read as a holding that the Fifth and Fourteenth Amendments always apply to aliens outside the United States.

did not, *id.* at 784-785. Later decisions reaffirmed that holding. See *Verdugo-Urquidez*, 494 U.S. at 269; *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders"); *Jifry*, 370 F.3d at 1182; *32 County Sovereignty Comm.* v. *Department of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). The court of appeals' decision remains correct following *Boumediene*.

b. In any event, this case is not a proper vehicle for determining the effect that *Boumediene* will have on Fifth and Eighth Amendment claims because—regardless of how that issue is resolved—the court of appeals correctly held, as an alternative basis for its decision, that respondents are entitled to qualified immunity on those claims because the applicability of the Fifth and Eighth Amendments to Guantanamo detainees was too unsettled at the time of petitioners' detention. Pet. App. 41a ("Even assuming *arguendo* [petitioners] can assert their Fifth and Eighth Amendment claims, those claims are nonetheless subject to [respondents'] assertion of qualified immunity."). See note 8, *supra*.

At the time of petitioners' detention (between 2002 and March 2004), it was, at a bare minimum, not clearly established that the Fifth and Eighth Amendments protected aliens detained abroad by the military. To the contrary, the case law uniformly held that aliens outside the sovereign territory of the United States did not have enforceable Fifth and Eighth Amendment rights. See pp. 18-19, *supra*.

Indeed, there were cases that specifically addressed the *lack* of constitutional rights for aliens at Guantanamo. The Eleventh Circuit had held that alien refugees

there had "no First Amendment or Fifth Amendment rights." *Cuban Am. Bar Ass'n*, 43 F.3d at 1428. Perhaps most telling, the District of Columbia Circuit specifically concluded—during the period of petitioners' detention—that the Fifth Amendment does *not* apply to aliens held at Guantanamo. *Al Odah* v. *United States*, 321 F.3d 1134, 1140-1144 (2003), rev'd on other grounds *sub nom. Rasul* v. *Bush*, 542 U.S. 466 (2004). Even after this Court reversed *Al Odah* on statutory grounds, see *Rasul*, 542 U.S. at 476, district courts reached opposing conclusions about whether Guantanamo detainees had Fifth Amendment rights. See *Boumediene*, 128 S. Ct. at 2241 (describing district court opinions). In fact, more than four years after petitioners were released from United States custody, this Court recognized that "before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Id.* at 2262.

When "judges thus disagree on a constitutional question, it is unfair to subject [public employees] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Accordingly, the court of appeals was correct in concluding that a reasonable officer would not have concluded that petitioners possessed Fifth and Eighth Amendment rights while they were detained at Guantanamo.

Petitioners assert (Pet. 31) that the court of appeals "relied on the absence of any constitutional ruling directly on point" in holding that the law was not clearly established. They further criticize (Pet. 33) the court of appeals for "approach[ing] the question of qualified immunity with a single, narrow question—was there a case holding torture at Guantánamo violated specific provi-

sions of the Constitution?" Although petitioners are correct that the absence of a ruling directly on point does not necessarily preclude a right from being clearly established, their characterization of the court of appeals' decision as relying upon the absence of a ruling on point is inaccurate. The court of appeals examined extensive authority that existed at the time of petitioners' detention and correctly determined that "Supreme Court and Circuit precedent, consistent with *Eisentrager*'s rejection of the proposition 'that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offense,' concluded that non-resident aliens enjoy no constitutional rights." Pet. App. 42a-43a (citing *Eisentrager*, 339 U.S. at 783; *Verdugo-Urquidez*, 494 U.S. at 269; *Jifry*, 370 F.3d at 1182; *People's Mojahedin Org.*, 182 F.3d at 22).[10]

Despite petitioners' claims to the contrary (Pet. 31-33), the court of appeals' decision is also consistent with *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *United States* v. *Lanier*, 520 U.S. 259 (1997). Those cases recognized that government officials can be on notice that their actions violate clearly established law "even in novel fac-

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[10] The court of appeals also discussed several relevant cases before concluding that "it was not clearly established at the time of the alleged violations—nor even today—that a reasonable officer would know that Guantanamo is sovereign United States territory." Pet. App. 44a. To the extent that this Court's later decision in *Boumediene* casts doubt on the earlier case law about places where the United States is not *de jure* sovereign, it does not address the question here because *Boumediene* held only that detainees have a procedural right to habeas corpus, see p. 18, *supra*, and *Boumediene* certainly provides no basis for denying qualified immunity. It is axiomatic that federal officials cannot be held liable based on later developments in the law. See, *e.g.*, *Anderson*, 483 U.S. at 640.

tual circumstances," *Hope*, 536 U.S. at 741, or in a kind of case with facts so extreme that the issue does not "even arise" in other cases, *Lanier*, 520 U.S. at 271 (internal quotation marks and citation omitted). This is not, however, such a case. As discussed above, several cases had held that aliens outside the sovereign territory of the United States—specifically including aliens at Guantanamo—did not possess several constitutional rights. As a result, to establish that the law was really the opposite would require an especially high degree of factual particularity. Cf. *ibid.* ("[W]hen an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary.").

Finally, petitioners claim (Pet. 34-35) that respondents "knew * * * that torture violated U.S. criminal and military law" or that torture had been held "unconstitutional when it occurred in U.S. prisons." But those allegations of the complaint (which the government does not concede) are insufficient to show that the *constitutional* rights that *petitioners* assert were clearly established. As this Court has made clear, qualified immunity applies unless it is clearly established that the defendant's alleged actions violate the same right that provides the basis for the plaintiff's claim. See *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984) ("[O]fficials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation."); *ibid.* ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation—of federal or of state law—unless that statute or regulation provides the basis for the cause of action sued upon."); see also

Elder v. *Holloway*, 510 U.S. 510, 515 (1994) (to defeat immunity, "the clearly established right" must be "the federal right on which the claim for relief is based"). Here, petitioners base their claim on violations of the Fifth and Eighth Amendments as they apply to aliens in Guantanamo, and thus must show that *those* rights (not any other statutory or constitutional rights) were clearly established.[11]

Because petitioners cannot make that showing, respondents are entitled to qualified immunity even if the court of appeals erred in holding that petitioners lacked enforceable rights under the Fifth and Eighth Amendments.

c. Further review is also inappropriate because petitioners' constitutional claims should be barred for an independent reason. As respondents argued in the court of appeals (Gov't C.A. Br. 35-40) and as Judge Brown determined in her concurring opinion (Pet. App. 55a-58a), even assuming that the conditions of petitioners' detention at Guantanamo were governed by the Fifth and Eighth Amendments, special factors counsel against recognizing a *Bivens* remedy in this context. See *Wilkie*

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[11] Petitioners rely (Pet. 32) on the discussion in *Hope* of an Alabama Department of Corrections regulation. But *Hope* did not use one form of illegality to establish a different one. Instead, the Court found that the Eighth Amendment right not to be subjected to a certain punishment was clearly established by "Eleventh Circuit precedent" that addressed the Eighth Amendment question and a Department of Justice report that also addressed the constitutional question. 536 U.S. at 745-746. The prison regulation was discussed because it authorized the punishment in question only under conditions that were "analogous to the practice upheld" in the key Eleventh Circuit case, and because the violation of the regulation meant that the punishment had been implemented in a way that the Eleventh Circuit had previously "described as impermissible" under the Eighth Amendment. *Id.* at 744.

v. *Robbins*, 127 S. Ct. 2588, 2598 (2007) (noting that even if there is no alternative damages remedy available to a putative *Bivens* plaintiff, the courts must "pay[] particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation") (quoting *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). This Court has already suggested that such a limitation on *Bivens* remedies would be appropriate if the Fourth Amendment were held to govern actions that the military took against aliens abroad. See *Verdugo-Urquidez*, 494 U.S. at 273-274. And the District of Columbia Circuit has previously held that no damages remedy should be available "against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (1985).

3. The court of appeals' holding—based on District of Columbia tort law—that petitioners' claims under the ATS and the Geneva Conventions must be brought, if at all, against the United States under the FTCA (Pet. App. 15a-35a) does not warrant further review.

Under the Westfall Act, 28 U.S.C. 2679(b)(1), claims against federal employees for allegedly tortious acts done within the scope of their employment must proceed exclusively against the United States under the FTCA. See *United States* v. *Smith*, 499 U.S. 160, 163 (1991). The scope of employment is determined by reference to local *respondeat superior* law. *Haddon* v. *United States*, 68 F.3d 1420, 1422-1423 (D.C. Cir. 1995). Petitioners have not contested the lower courts' selection of the District of Columbia as the relevant locality here. Pet. App. 18a, 114a.

As in the court of appeals (see Pet. App. 20a-21a), petitioners challenge only one component of the scope-

of-employment test under District of Columbia law whether the acts in question are "incidental" to an employee's duties, and thus "of the kind [the employee] is employed to perform." Restatement (Second) of Agency § 228(1) (1958); see *Stokes* v. *Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003) (explaining that "District of Columbia law * * * looks to the Restatement (Second) of Agency (1958) in defining scope of employment").

Petitioners contend (Pet. 36) that "[t]orture is not incidental to military operations." They cite court of appeals cases holding that torture is illegal and criminal (both in this country and abroad), see *Nuru* v. *Gonzales*, 404 F.3d 1207, 1222-1223 (9th Cir. 2005); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980); *Khouzam* v. *Hogan*, 529 F. Supp. 2d 543, 552 (M.D. Pa. 2008), or that, in specific circumstances, acts of torture were not attributable to a foreign agency or instrumentality for purposes of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, see *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); *Zuncax* v. *Gramajo*, 886 F. Supp. 162, 175-176 & n.10 (D. Mass. 1995). Petitioners do not, however, account for the case law explaining what conduct is within the scope of employment.

Under the District of Columbia law of *respondeat superior*, the fact that an act is illegal or otherwise a crime does not necessarily mean that it is outside the scope of employment, because the focus of the inquiry is not "the nature of the tort," but whether the "underlying dispute or controversy" was "originally undertaken on the employer's behalf." *Council on Am. Islamic Relations* v. *Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting *Weinberg* v. *Johnson*, 518 A.2d 985, 992 (D.C.

1986)); see Pet. App. 23a, 25a-26a. In other words, "[c]onduct is 'incidental' to an employee's legitimate duties" if it is "a direct outgrowth of the employee's instructions or job assignment." *Haddon*, 68 F.3d at 1424 (citation omitted). Thus, as the court of appeals discussed (Pet. App. 23a-24a), cases applying the relevant standard under District of Columbia law have held that employees were acting within the scope of their employment when they defamed political opponents or raped and shot their customers, because the underlying disputes grew out of the employees' duties. See *Ballenger*, 444 F.3d at 664-665 (Congressman's allegedly defamatory statements held to be incidental to his office); *Lyon* v. *Carey*, 533 F.2d 649 (D.C. Cir. 1976) (deliveryman's assault and rape of customer held to be within scope of employment); *Johnson* v. *Weinberg*, 434 A.2d 404, 409 (D.C. 1981) (laundromat worker's shooting of customer held to be within scope of employment).

Here, petitioners cannot deny that the conduct they challenge grew out of a dispute related to respondents' official functions. Indeed, their complaint expressly alleged that respondents were motivated by a desire to serve their employer in the course of their job duties (*i.e.*, that they took action designed to elicit information about terrorism during interrogations).[12] Pet. App. 168a-169a, 208a; see *Ballenger*, 444 F.3d at 665 ("even a *partial* desire to serve the master is sufficient"). Respondents had specific responsibilities related to the

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[12] By the same token, any suggestion (Pet. 35) that the court of appeals erred in holding that petitioners' alleged mistreatment was "foreseeable" cannot be reconciled with their allegation that the mistreatment was the result of "deliberate and foreseeable action" rather than "isolated or rogue actions." Pet. App. 168a; see also Pet. 23-24.

custody and interrogation of detainees.[13] Pet. App. 174a-178a. Petitioners cite no case suggesting that those whose jobs include interrogation and custody act outside the scope of their employment when they mistreat a detainee during an interrogation (any more than a deliveryman acts outside the scope of employment under District of Columbia law by raping a customer). Moreover, petitioners' reliance (Pet. 36-37) on a Department of State report, which states in its discussion of the Uniform Code of Military Justice that torture is not within the "scope" of a commanding officer's position (Pet. App. 231a), is inapposite because it does not address the common law standard for determining the scope of employment in the relevant jurisdiction—here, the District of Columbia.

Finally, petitioners argue (Pet. 35-36) that the court of appeals' holding based on District of Columbia *respondeat superior* law effectively endorsed the "repellent proposition" that torture is an acceptable incident of interrogation. That reflects a misunderstanding of the Westfall Act. "Defining an employee's scope of employment is not a judgment about whether alleged conduct is deleterious or actionable; rather, this procedure merely determines *who* may be held liable for that conduct, an employee or his boss." *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 265 (D.D.C. 2004), aff'd, 412 F.3d 190 (D.C. Cir. 2005), cert. denied, 547 U.S. 1069 (2006). The language of the Westfall Act covers claims alleging "wrongful" acts within the scope of employment, and makes no exception for acts that are not just wrongful

[13] One respondent allegedly provided a legal opinion purporting to justify mistreatment of detainees as part of her job as a Chief Legal Advisor. Pet. App. 178a-179a. Providing a legal opinion is exactly the "kind" of task a legal advisor is employed to perform.

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but also illegal or repellent. 28 U.S.C. 2679(b)(1). As one court observed in a related context, "if the scope of an official's authority or line of duty were viewed as co-extensive with the official's lawful conduct, then immunity would be available only where it is not needed." *Ramey* v. *Bowsher*, 915 F.2d 731, 734 (D.C. Cir. 1990) (internal quotation marks and citation omitted). That is no less true when an employee claims immunity from suit under the Westfall Act because the plaintiff's sole recourse lies against the United States under the FTCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2008